

**United States Department of Labor
Employees' Compensation Appeals Board**

N.C., Appellant

and

**DEPARTMENT OF VETERANS AFFAIRS,
VETERANS ADMINISTRATION MEDICAL
CENTER, Cleveland, OH, Employer**

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**Docket No. 17-0527
Issued: April 20, 2017**

Appearances:

*Alan J. Shapiro, Esq., for the appellant¹
Office of Solicitor, for the Director*

Case Submitted on the Record

DECISION AND ORDER

Before:

CHRISTOPHER J. GODFREY, Chief Judge
PATRICIA H. FITZGERALD, Deputy Chief Judge
VALERIE D. EVANS-HARRELL, Alternate Judge

JURISDICTION

On January 10, 2017 appellant, through counsel, filed a timely appeal from a September 21, 2016 merit decision of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act² (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.

¹ In all cases in which a representative has been authorized in a matter before the Board, no claim for a fee for legal or other service performed on appeal before the Board is valid unless approved by the Board. 20 C.F.R. § 501.9(e). No contract for a stipulated fee or on a contingent fee basis will be approved by the Board. *Id.* An attorney or representative's collection of a fee without the Board's approval may constitute a misdemeanor, subject to fine or imprisonment for up to one year or both. *Id.*; see also 18 U.S.C. § 292. Demands for payment of fees to a representative, prior to approval by the Board, may be reported to appropriate authorities for investigation.

² 5 U.S.C. § 8101 *et seq.*

ISSUE

The issue is whether appellant has met his burden of proof to establish a ratable permanent impairment due to his accepted left fourth finger injury.

FACTUAL HISTORY

On July 11, 2012 appellant, then a 55-year-old cook, filed a traumatic injury claim (Form CA-1) for a left hand injury he reportedly sustained in the performance of duty on June 18, 2012.³ OWCP initially accepted the claim for left fourth finger sclerosing nodular tendinitis. In November 2012, it expanded appellant's claim to include left trigger finger (acquired) and left contracture of the tendon (sheath). OWCP also authorized a December 10, 2012 left ring finger surgical procedure performed by Dr. Nina M. Njus, a Board-certified orthopedic hand surgeon.⁴ Following surgery, appellant received wage-loss compensation for temporary total disability through January 26, 2013. He resumed his regular, full-time duties, effective January 27, 2013.

On August 6, 2013 appellant filed a claim for a schedule award (Form CA-7).

In May 9, 2013 progress notes, Dr. Njus indicated that, on physical examination, appellant had full range of motion (ROM) upon extension and flexion of the left fourth finger. She posited that appellant had no residual deformity or impairment.

In a July 9, 2013 report, Dr. Njus noted that appellant had been under her care for left ring trigger finger, and had his trigger finger surgically released. She further noted that appellant was functioning well without deformity or impairment, and had reached maximum medical improvement (MMI).

In an August 20, 2013 report, Dr. John L. Dunne, a Board-certified occupational medicine physician, provided a diagnosis-based impairment (DBI) rating under Table 15-2, Digit Regional Grid, American Medical Association, *Guides to the Evaluation of Permanent Impairment* 391-94 (6th ed. 2009) (A.M.A., *Guides*). He rated appellant using the DBI methodology based on the diagnosis of digital stenosing tenosynovitis (trigger digit), and found zero percent permanent impairment.⁵

³ Appellant indicated that he was turning the valve on the drain of a steam kettle when he felt a sharp pain in his left hand.

⁴ Dr. Njus performed a left ring trigger release with excision of one-half of the flexor digitorum sublimis (FDS) tendon.

⁵ Initially in Chapter 15, when defining DBI, ROM is noted to be used primarily as a physical examination adjustment factor and only to determine actual impairment values when a grid permits its use as an option. Diagnoses in the particular regional grids that may alternatively be rated using ROM are followed by an asterisk (*). Stenosing tenosynovitis (trigger digit) is a diagnosed condition listed in the grid followed by an *.

On September 22, 2013 OWCP's Dr. Morley Slutsky, a district medical adviser (DMA) Board-certified in occupational medicine, reviewed the claim and concurred with Dr. Dunne's August 20, 2013 rating of zero percent permanent impairment of the left fourth finger.

By decision dated October 1, 2013, OWCP denied appellant's claim for schedule award, finding that he had no measurable permanent impairment based on the opinions of Dr. Dunne and the DMA.

On December 22, 2014 appellant filed another claim for a schedule award (Form CA-7).

In support of this latest claim, appellant submitted a November 14, 2014 report from Dr. Catherine Watkins Campbell, a Board-certified family practitioner. Dr. Watkins Campbell provided ROM findings for appellant's left ring finger and noted minimal variable tenderness at the fourth metacarpophalangeal (MCP) joint, and normal two-point discrimination. She also provided pinch and grip strength measurements, the latter of which she deemed invalid due to excessive variance. Dr. Watkins Campbell advised that appellant reached MMI as of July 9, 2013. Citing Table 15-2, A.M.A., *Guides* 392 (6th ed. 2009), utilizing the DBI method, she found class 1 impairment Class of Diagnosis (CDX) based on the diagnosis of digital stenosing tenosynovitis, with a default (grade C) digit impairment of six percent, due to appellant's symptomatic trigger finger postsurgical correction. With respect to grade modifiers, she assigned 0 for Functional History (GMFH) and 1 for Physical Examination (GMPE).⁶ Dr. Watkins Campbell calculated a net adjustment of -1, and therefore, found 5 percent (grade B) impairment.⁷ Although Table 15-2 provides ratings for digit impairments, Dr. Watkins Campbell noted five percent permanent impairment of the left upper extremity.

In a report dated May 5, 2015, the DMA indicated that the left ring finger ROM deficits Dr. Watkins Campbell reported were inconsistent with appellant's prior best effort at MMI (May 9, 2013), and there was no reason why his finger should have deteriorated relative to the initial injury. Consequently, the DMA deferred to the prior "most consistent" findings at MMI, and concluded that appellant had no residual left finger problems. He found zero percent impairment under Table 15-2, which he noted was the same impairment rating previously assigned by Dr. Dunne and Dr. Njus.

In a decision dated December 14, 2015, OWCP denied appellant's claim for schedule award benefits because the medical evidence of record did not establish ratable permanent impairment of a scheduled member. It found that the weight of the medical evidence regarding this matter rested with the DMA's opinion.

Appellant, through counsel, requested a telephone hearing with a representative of OWCP's Branch of Hearings and Review, which was held on August 3, 2016. By decision dated

⁶ Dr. Watkins Campbell indicated that there were no applicable clinical studies in the case record, therefore, she did not assign a grade modifier for Clinical Studies (GMCS).

⁷ Net Adjustment = (GMFH-CDX) + (GMPE-CDX) + (GMCS-CDX). See section 15.3d, A.M.A., *Guides* 411 (6th ed. 2009).

September 21, 2016, the hearing representative affirmed the December 14, 2015 decision denying appellant's schedule award claim.

LEGAL PRECEDENT

Section 8149 of FECA delegates to the Secretary of Labor the authority to prescribe rules and regulations for the administration and enforcement of FECA. The Secretary of Labor has vested the authority to implement the FECA program with the Director of OWCP.⁸ Section 8107 of FECA sets forth the number of weeks of compensation to be paid for the permanent loss of use of specified members, functions, and organs of the body.⁹ FECA, however, does not specify the manner by which the percentage loss of a member, function, or organ shall be determined. To ensure consistent results and equal justice under the law, good administrative practice requires the use of uniform standards applicable to all claimants. Through its implementing regulations, OWCP adopted the A.M.A., *Guides* as the appropriate standard for evaluating schedule losses.¹⁰

The sixth edition of the A.M.A., *Guides* was first printed in 2008. Within months of the initial printing, the A.M.A. issued a 52-page document entitled "Clarifications and Corrections, Sixth Edition, *Guides to the Evaluation of Permanent Impairment*." The document included various changes to the original text, intended to serve as an *erratum*/supplement to the first printing of the A.M.A., *Guides*. In April 2009, these changes were formally incorporated into the second printing of the sixth edition.

As of May 1, 2009, schedule awards are determined in accordance with the sixth edition of the A.M.A., *Guides* (2009).¹¹ The Board has approved the use by OWCP of the A.M.A., *Guides* for the purpose of determining the percentage loss of use of a member of the body for schedule award purposes.¹²

ANALYSIS

The issue on appeal is whether appellant has met his burden of proof to establish a ratable permanent impairment due to his accepted left fourth finger injury. The Board finds that this case is not in posture for decision.

The Board has found that OWCP has inconsistently applied Chapter 15 of the sixth edition of the A.M.A., *Guides* when granting schedule awards for upper extremity claims. No

⁸ See 20 C.F.R. §§ 1.1-1.4.

⁹ For a complete loss of use of an arm, an employee shall receive 312 weeks' compensation. 5 U.S.C. § 8107(c)(1).

¹⁰ 20 C.F.R. § 10.404; see also *Ronald R. Kraynak*, 53 ECAB 130 (2001).

¹¹ See Federal (FECA) Procedure Manual, Part 3 -- Medical, *Schedule Awards*, Chapter 3.700, Exhibit 1 (January 2010); Federal (FECA) Procedure Manual, Part 2 -- Claims, *Schedule Awards and Permanent Disability Claims*, Chapter 2.808.5a (February 2013).

¹² *Isidoro Rivera*, 12 ECAB 348 (1961).

consistent interpretation has been followed regarding the proper use of the DBI or the ROM methodology when assessing the extent of permanent impairment for schedule award purposes.¹³ The purpose of the use of uniform standards is to ensure consistent results and to ensure equal justice under the law to all claimants.¹⁴ In *T.H.*, the Board concluded that OWCP physicians are at odds over the proper methodology for rating upper extremity impairment, having observed attending physicians, evaluating physicians, second opinion physicians, impartial medical examiners, and district medical advisers use both DBI and ROM methodologies interchangeably without any consistent basis. Furthermore, the Board has observed that physicians interchangeably cite to language in the first printing or the second printing when justifying use of either ROM or DBI methodology. Because OWCP's own physicians are inconsistent in the application of the A.M.A., *Guides*, the Board finds that OWCP can no longer ensure consistent results and equal justice under the law for all claimants.¹⁵

In light of the conflicting interpretation by OWCP of the sixth edition with respect to upper extremity impairment ratings, it is incumbent upon OWCP, through its implementing regulations and/or internal procedures, to establish a consistent method for rating upper extremity impairment. In order to ensure consistent results and equal justice under the law for cases involving upper extremity impairment, the Board will set aside the September 21, 2016 decision. Following OWCP's development of a consistent method for calculating permanent impairment for upper extremities to be applied uniformly, and such other development as may be deemed necessary, OWCP shall issue a *de novo* decision on appellant's claim for an upper extremity schedule award.

CONCLUSION

The Board finds this case not in posture for decision.

¹³ *T.H.*, Docket No. 14-0943 (issued November 25, 2016).

¹⁴ *Ausbon N. Johnson*, 50 ECAB 304, 311 (1999).

¹⁵ *Supra* note 13.

ORDER

IT IS HEREBY ORDERED THAT the September 21, 2016 decision of the Office of Workers' Compensation Programs is set aside, and the case is remanded for further action consistent with this decision.

Issued: April 20, 2017
Washington, DC

Christopher J. Godfrey, Chief Judge
Employees' Compensation Appeals Board

Patricia H. Fitzgerald, Deputy Chief Judge
Employees' Compensation Appeals Board

Valerie D. Evans-Harrell, Alternate Judge
Employees' Compensation Appeals Board